

Widening and strengthening the appeal of Convention 108

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Introduction

Over the last 30 years technology changed dramatically, but legal instruments governing the right to data protection settled. Instruments such as the OECD privacy principles¹, the European Data Protection Directive², and Convention 108³ proved their strength. Around 2010 time had come for the revision and modernisation of the international data protection framework “to deal with challenges for privacy resulting from the use of new information and communication technologies”.⁴ For this reason on 10 March 2010 the Council of Europe Committee of Ministers encouraged the modernisation of the Convention for the Protection of Individuals with Regard to the Processing of Personal Data (aka Convention 108). Being the only legally binding international treaty dealing with privacy and data protection, the Council of Europe pushes Convention 108 to be recognized as “the only practicable and ready-made option for global privacy standards”. The Convention should remain open to third countries and should be applicable to the public and private sector, including law enforcement.⁵ On 3 December 2014 the ad hoc committee on Data Protection (CAHDATA) released the draft amending protocol for transmission to the Committee of Ministers.⁶ Baseline principles enacted before the breakthrough of the Internet – comparable to the revisions of the OECD Guidelines⁷ and the EU Data Protection Regulation⁸ – are confirmed in this draft. However, wordings of core provisions are adapted to create stronger but internationally acceptable principles, transborder data flows are addressed with increased attention and a strong follow-up mechanism is included.

Strong but internationally acceptable principles.

¹ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 1980.

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

³ Convention for the protection of individuals with regard to automatic processing of personal data, Council of Europe, 28 January 1981.

⁴ Council of Europe response to privacy challenges Modernisation of Convention 108, position paper, 32nd International Conference of Data Protection and Privacy Commissioners, 27-29 October 2010, Jerusalem, Israel.

⁵ Council of Europe, Press release “Council of Europe points to the Data Protection Convention as global standard”, Strasbourg, 27 October 2011.

⁶ Draft amending protocol to Convention 108 accepted by the ad hoc committee on data protection (CAHDATA) on 3 December 2014.

⁷ OECD Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data revision approved in 2013.

⁸ European Commission proposal for a General Data Protection Regulation, 25 January 2012.

When comparing the 2012 proposals⁹ to the 2014 draft amendment four major revisions stand out:

- The draft proposal emphasises its **positive approach to human rights**.¹⁰ The wordings in articles 1, 3.1 and 9.1.b. were changed and it was added that *human* rights and fundamental freedoms, in particular the right to privacy, are to be respected regardless of the individual's nationality or residence. De Terwangne observes that the Convention does not wish to be just a defensive instrument "designed to guarantee data confidentiality or to prohibit the processing of certain sensitive data (...). On the contrary it reflects a more positive approach in that it is the manifestation of the right to informational self-determination".¹¹
- The Convention stresses that these human rights have to be **respected by everyone for all personal data**.¹² Building on the proposals made in 2012 to include manual data processing and on the unanimous agreement to keep law enforcement under the Convention¹³, article 3 now explicitly states that the Convention applies to all public and private sectors. Reservations are not allowed.
- In line with the revised OECD guidelines and the new European Data Protection Package, the 2014 proposal introduces a set of **"new" obligations to promote the application of data protection rules in practice**, namely: accountability, privacy impact assessments and privacy by design. The Parties may scale the content of these obligations according to the nature and volume of the data, the nature, scope and purpose of the processing and the size of the controller and processor. However, it is worth noticing that the 2014 text focuses more on the "what" -the actual respect for individual's rights -rather than on the "how". Small changes in wording between the 2012 and 2014 text further strengthen data subject's rights. In article 8 for example words like "compelling" are eliminated and phrases like "free of charge" and "without excessive delay" have been added. Yet, some provisions come in a watered-down version. This is for example the case for privacy by design. The version of 2012 marked two goals for Privacy by Design, namely to integrate privacy considerations into the design of services and products and to facilitate legal compliance. The second objective disappears in the 2014 version.
- An last eye catching revision is the wording of article 8bis. As indicated above the goal of Article 8bis was to promote the application of data protection rules in practice. The Council now seems to accept that in practice the application of data protection principles is often a **shared responsibility**. While in 2012 article 8 bis was formulated in singular form, the 2014

⁹ The Consultative committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Proposition of Modernisation, 18 December 2012.

¹⁰ P. de Hert, V. Papakonstantinou "The Council of Europe Data Protection Convention reform: Analysis of the new text and critical comment on its global ambition", Computer Law and Security Review, 2014, Vol30, pp 633-642.

¹¹ C. de Terwangne, The Work of Revision of the Council of Europe Convention 108 for the protection of Individuals as Regards the Automatic Processing of Personal Data, International Review of Law, Computers & Technology, Volume 28, Issue 2, 2014, pp 118-130.

¹² G. Greenleaf, "'Modernising' data protection Convention 108: A safe basis for a global privacy treaty?", Computer Law and Security Review, Vol29, Issue 4, July/August 2013.

¹³ P. de Hert, V. Papakonstantinou "The Council of Europe Data Protection Convention reform: Analysis of the new text and critical comment on its global ambition", Computer Law and Security Review, 2014, 633-642.

proposal uses plural: “controllers and [...] processors take all appropriate measures to comply”.¹⁴ By using plural the Convention seems to take into account the possibility of **co-controllership and shared liabilities**.

Transborder data flows

The regime of transborder data flows is a key aspect of international cooperation. In order for the Convention to provide an added value as a legally binding global standard, Parties must obtain a guarantee that reciprocal transfers of personal data may take place. Similarly, transfers to Third Parties should be strictly regulated.

The issue is of importance for European Union countries. If the Convention establishes a free flow of information between its Parties, this means that its provisions must be fully compatible with EU data protection framework. In other words, all Parties to the Convention must meet the criteria of adequacy established under these instruments. Given that so few countries benefitted from an adequacy Decision so far, the situation seems untenable. Actually, even if the principle of free flow of information is currently the rule, in practice none of EU Member States feels free to allow data transfers to countries that do not meet EU standards.¹⁵ In order to remedy this situation, the text of 2014 adds a specific derogation for parties “bound by harmonised rules of protection shared by States belonging to a regional international organisation”¹⁶.

With regard to data flows to countries not Party to the Convention, the challenge is to ensure an effective protection without being too restrictive. The covenants opted for requiring an “appropriate” level of protection. It will be up to the Convention Committee to further define what this new term –unknown to data protection terminology- means. This might however be problematic as its powers of interpretation are not binding¹⁷ and disputes about the Convention are not subject to the revision of the Courts.¹⁸

Enforcement of the Convention

One main challenge for the Council of Europe was to give credibility to the Convention as potential international standard. To that end, the Council had to introduce specific mechanisms to ensure its effective implementation in practice.

¹⁴ Article 8bis draft amending protocol to Convention 108 accepted by the ad hoc committee on data protection (CAHDATA) on 3 December 2014.

¹⁵ C. de Terwangne, The Work of Revision of the Council of Europe Convention 108 for the protection of Individuals as Regards the Automatic Processing of Personal Data, *International Review of Law, Computers & Technology*, Volume 28, Issue 2, 2014, pp 118-130

¹⁶ Article 12, 1 draft amending protocol to Convention 108 accepted by the ad hoc committee on data protection (CAHDATA) on 3 December 2014.

¹⁷ G. Greenleaf, “‘Modernising’ data protection Convention 108: A safe basis for a global privacy treaty?”, *Computer Law and Security Review*, Vol29, Issue 4, July/August 2013

¹⁸ Ibid

The first step was to ensure that countries requesting to accede to the Convention complied with its provisions (for all or only part of their territories). The Convention introduces two mechanisms of control:

- the Convention Committee will advise about the level of protection of the candidate for accession;
- Signatory Parties will be able to veto accession by countries that are not members of the Council of Europe.

It was then necessary to create specific means to ensure an effective application of the provisions of the Convention. The Council opted for three mechanisms:

- **Powerful and independent supervisory authorities.** The 2014 draft amendment to the Convention strengthens the role given to data protection authorities. The Convention grants them additional competences and explicitly requires that they act in complete independence and impartiality. This includes the obligation for Parties to provide their data protection authorities with sufficient resources, to ensure the periodic publication of activity reports and to subject their members to a duty of secrecy.
- **A network of supervisory authorities.** Substantial effort is devoted to establish the right framework to create a network of data protection authorities. Article 12bis §7 defines an obligation for these authorities to co-operate by providing mutual assistance, information and documentation on their law and administrative practice and by coordinating investigations. It also introduces the possibility to conduct joint actions. By doing so, the Convention builds on existing initiatives such as the International Conference of Data Protection and Privacy Commissioners or the Global Privacy Enforcement Network that developed within the OECD.
- **Uniform interpretation of the Convention.** The Convention Committee is charged with ensuring a uniform interpretation of the Convention through opinions, recommendations or by settling difficulties related to its application. In that sense, this Committee resembles the Article 29 Data Protection Working Party, except for the fact that it is constituted of State representatives.¹⁹

Convention 108 as the new global privacy standard?

The 2014 text of the Convention has been adapted as to open the possibility for its recognition as a global privacy standard. It contains up-to-date and widely accepted standards of protection that could be accepted by non-European parties. It implements a regime for transborder data flows that permits a free flow of information between its Members while accommodating the specificities of regional organisations (mainly its European Union members). And finally it incorporates mechanisms to ensure its application in practice, adding to its credibility.

It is however difficult to predict to what extent the current text will be able to deliver its promises. A large part of the success will most certainly depend on its active promotion by the Council of Europe

¹⁹ Greenleaf G. 'Modernising' data protection Convention 108: a safe basis for a global privacy treaty?, Computer Law & Security Review, Vol 29, Issue 4, July/August 2013.

towards third Parties. They will need to be convinced of the real added value of such instrument and of its potential to emancipate from the European Union model.

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